No. 14,555.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and LEE ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK, and DAVID D. SALLEE,

Appellees.

LEE ARENAS,

Appellant,

vs.

JOHN W. PRESTON, OLIVER O. CLARK, and DAVID D. SALLEE,

Appellees.

PETITION FOR REHEARING.

JOHN W. PRESTON,
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OLIVER O. CLARK,
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DAVID D. SALLEE,
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Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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PETITION FOR REHEARING.

To the Honorable United States Court of Appeals for the Ninth Circuit and the Judges Thereof:

Come now John W. Preston, Oliver O. Clark, and David D. Sallee, appellees in the above-entitled cause, and present this, their petition for a rehearing of said cause by this Court, and in support thereof respectfully show:

That the opinion of this Court filed herein on the 23d day of February, 1956, denying interest on the judgment for attorney fees and expenses advanced from and after a date of six months after entry of said judgment on April 6, 1951, should be reconsidered and set aside by this Court for the following reasons, to wit:

1. This fee proceeding is a part of the original Lee Arenas litigation begun in 1940, entitled *Lee Arenas, Plaintiff vs. United States of America, Defendant,* No. 1321-O'C Civil in the District Court of the United States for the Southern District of California. The District Court had jurisdiction of the parties and subject matter of said action under Title 25 U. S. C. A. section 345, and this court had jurisdiction on appeal under 28 U. S. C. A. section 1291.

2. The jurisdiction of the District Court herein is equitable in its nature, and such equitable jurisdiction was declared and sustained by this court in the Lee Arenas litigation, and especially in *Arenas v. Preston,* 181 F. 2d 62, 66, where the allowance of attorney fees was under consideration.

3. That the District Court has full equity jurisdiction and powers in this litigation is now the law of this case in view of the decision (opinion by Judge Stephens) in *Arenas v. Preston,* 181 F. 2d 62, 66, and other cases relating to attorney fees decided by this court.

4. The District Court has never exhausted or exercised its full equity jurisdiction herein, and the case is still open for the exercise of such jurisdiction.

5. The decision of this Court, entered on the 23d day of February, 1956, is in conflict with its previous fee decisions in this litigation, because it restricts and takes away to a large degree the equity powers of the District Court. The previous decisions of this Court sustaining the allowance of attorney fees and the fixing of liens upon the allotments obtained by appellees for the Indians to secure such fees are predicated largely upon the ground that such allowance and award are for the best interests of the Indians. To curtail this equitable jurisdiction and

power would make it more difficult for the Indians to secure expenses and legal services to enforce their legal rights against the United States of America. The best illustration of the injury that would result to the Indians from curtailment of the District Court's equitable jurisdiction and powers is found in the chronology of the Arenas litigation and the dilatory and inequitable conduct and practices of the Government disclosed in said litigation. The Government should not be allowed to take advantage of said conduct and practices.

6. The judgment for interest herein is not a judgment against the United States, and the payment of said judgment out of the Indian's land, or from the proceeds of the sale of said land, causes no depletion of the funds of the United States in its treasury, or otherwise. The United States is, at most, only a guardian or trustee of the Indian, and the payment of interest on a valid and lawful judgment against the Indian ward or *cestui que trust* in no way affects the United States in its sovereign capacity, or otherwise.

7. The decision of this Court is in conflict with the rule that where the United States is a necessary but nominal party to a suit, without liability for any money judgment rendered against other parties therein, the rule of sovereign immunity from liability for interest does not apply.

Miller v. Robertson, 266 U. S. 243, 257;

Brownell v. Bank of America, 214 F. 2d 855, 856-857, and comment in fn. 10;

United States v. Creek Nation, 295 U. S. 103, 113;

Standard Oil Co. v. United States, 267 U. S. 76, 79.

Cf.

St. Paul etc. Co. v. United States, 201 F. 2d 57;

Southern Printing Co. v. United States, 222 F. 2d 431;

DuPont v. Lyles & Long Const. Co., 219 F. 2d 328, 341 and cases cited.

8. The decision of this Court is in conflict with the rule that "when necessary in order to arrive at fair compensation, the Court in the exercise of a sound discretion may include interest or its equivalent as an element of damages." (*Miller v. Robertson,* 266 U. S. 243, 258.) To the same effect are:

Concordia Ins. Co. v. School Dist., 282 U. S. 545, 554-555;

Standard Oil Co. v. United States, 267 U. S. 76, 79;

De La Rama v. De La Rama, 241 U. S. 154, 159-160;

The Paquete Habana, 189 U. S. 453, 467;

Eddy v. LaFayette, 163 U. S. 456, 467;

Demotte v. Whybrow, 263 Fed. 366, 368.

Many State cases are to like effect.

The District Court exercised its sound discretion in allowing appellees interest on the judgment for fees from a date six months subsequent to the entry of said judgment.

9. The item called interest herein, is in reality, damages allowed appellees, as lien claimants, for delay in payment of a lawful judgment, or for redemption of the land or proceeds of sale thereof from the lien of said judgment; hence, interest was properly allowed by the District Court.

ARGUMENT.

I.

The Decision of This Court in Arenas v. Preston, 181 F. 2d 62, 66, That the District Court Has Full Equity Jurisdiction of the Parties and Subject Matter of This Litigation Is the Law of the Case and Is Binding Upon Both the District Court and This Court.

In *Arenas v. Preston,* 181 F. 2d 62, 66, this Court repudiated the argument of the United States that the District Court cannot apply the general rule "that a court of equity may settle incidental questions as well as fundamental questions, because the applicable statutes in this case do not specifically authorize it." This Court further said (*Id.,* pp. 66-67):

> "When the United States authorized the Indian to make the United States an adversary party in its own courts, it did so knowing that the Indian by himself was incapable of taking advantage of the privilege and that attorneys fees and other expenses would be the unavoidable concomitant * * *. It seems to us that Congress could not have intended to commit the subject to its courts with any paralyzing limitation but, in committing the subject to its courts it intended them to fully exercise their general equitable jurisdiction."

The quoted statement, *supra,* was in answer to the question propounded by this Court on page 65 (181 F. 2d):

> "Does the equitable jurisdiction of federal courts under the Act of 1894 (*i. e.,* 25 U. S. C. A. Sec. 345) invoke all equitable processes and hence permit the application of rules '* * * which experience has shown to be essential to the adequate protection of a wronged *cestui que trust* * * *'?"

In its previous decision, *supra,* this Court decided that the District Court, under 25 U. S. C. A., Sec. 345, was given full equity jurisdiction and power to award attorneys fees and to impress an equitable lien upon the restricted lands of Arenas to secure payment thereof, and to sell said lands to satisfy such equitable lien. This jurisdiction extended to and included the United States by virtue of its consent to be sued under 25 U. S. C. A., Sec. 345. This Court's decision in *Arenas v. Preston,* 181 F. 2d 62, is now, and at all times since it was rendered has been, the law of this case.

It is important to note in this connection that the District Court has never exhausted or surrendered its full equity jurisdiction in this case but, on the contrary, in each of its judgments and decrees has retained such jurisdiction. In the District Court's judgment and supplemental decree [R. 3-8] awarding attorneys fees and expenses it was provided:

> "SIXTH: The Court hereby retains jurisdiction over this action and the parties thereto and the subject matter thereof (for various and sundry purposes) * * * and in order to fully effectuate and enforce the supplemental decree herein in accordance with the equitable jurisdiction, practice and procedure of this court."

And, in the order for the sale of the real property of Lee Arenas and Eleuteria Brown Arenas to satisfy said judgment and supplemental decree the District Court provided [R. 14]:

> "Further Ordered and Decreed herein that jurisdiction of this proceeding is retained to so adjust the lands and proceeds, or the lands or proceeds, remaining after satisfaction of said judgment as to cause

the Lee Arenas lands to bear three-fourths of the burden, and the Eleuteria Brown Arenas lands to bear one-fourth of the burden of said judgment; and jurisdiction is also retained to make all orders necessary, advisable, or expedient to put this adjustment into execution."

It thus appears that at the time the District Court ordered interest to be paid on the judgment for fees and expenses it had full equity jurisdiction and power to make and enforce its order against the parties defendant, including the United States. It may also be added that the District Court now has the equity jurisdiction retained in its several decrees.

II.

The Decision of This Court, Entered on the 23rd Day of February, 1956, Is in Conflict With Its Decision in Arenas v. Preston, 181 F. 2d 62, and Other Fee Decisions, Because It Restricts and Takes Away to a Large Degree the Equity Powers of the District Court.

In this Court's former decision in *Arenas v. Preston,* 181 F. 2d 62, it was expressly held that the District Courts had the power "to fully exercise their general equitable jurisdiction" in cases within the provisions of the jurisdictional Act of 1894 (25 U. S. C. A., Sec. 345), including the settlement of "incidental questions as well as fundamental questions" even though the "applicable statutes in this case do not specifically authorize it."

We think it is clear that the allowance of interest on a judgment in equity is one of the "incidental questions" referred to by the Court; and under the facts of this case the allowance of interest on the judgment and supple-

mental decree was authorized and proper under general equity rules and practice.

However, the decision of this Court on February 23, 1956, is, we respectfully submit, in conflict with the Court's former decision which, we believe, is the law of the case and which, moreover, correctly states the applicable rule. It is well settled in both federal and state courts that a court of equity whose jurisdiction has been invoked for one purpose may determine all equities between the parties which are connected with the main subject of the suit. This is true even though the original complaint would not lie for incidental relief alone.

30 C. J. S. 420, Sec. 67 of Equity;

Brame v. Keystone Credit Corp., 76 F. 2d 328, cert. den. 296 U. S. 591;

Pease v. Rathbun-Jones Eng. Co., 243 U. S. 273;

Taylor v. Spurway, 72 F. 2d 97;

Greer Inv. Co. v. Booth, 62 F. 2d 321;

Sears v. Rule, 27 Cal. 2d 131, and cases cited at p. 149.

The relief incidental to the main subject matter will, if equitable, be granted "whether or not the particular relief was requested." (*Sears v. Rule, supra,* p. 149.) And, as said in *Pease v. Rathbun-Jones Eng. Co.,* 243 U. S. 273, 37 S. Ct. 284, at p. 286:

> "A court of equity, having jurisdiction of the principal case, will completely dispose of its incidents and put an end to further litigation."

The allowance of interest on the judgment of the District Court was in accordance with the equitable principle that in equity interest may be allowed on a claim reduced

to judgment as compensation to the judgment creditor for loss of the use of his money.

Miller v. Robertson, 266 U. S. 243;

Spalding v. Mason, 161 U. S. 375, 396;

Young v. Godbe, 82 U. S. 562;

Curtis v. Innerarity, 6 How. 146, 154, 12 L. Ed. 380.

Many other cases are cited in appellees' brief, at pages 10-11.

The full exercise of its equitable jurisdiction by the District Court in cases within the purview of 25 U. S. C. A., Sec. 345 is an imperative if an Indian *cestui que trust* is to be in position to protect or enforce his right to an allotment of tribal lands. To restrict or curtail such jursdiction would not be to the best interest of Indians, nor of their attorneys, for in that event it would become more difficult for any Indian to secure his legal rights against the United States. The history of the Arenas litigation illustrates the point.

It may well be doubted whether any lawyer would have accepted employment in the *Lee Arenas* case, if he had known or suspected that the Government would resort to the obstructing and delaying tactics it has employed throughout the case. As a matter of fact, the *Arenas* case was filed in December 1940. Judgment for Arenas was entered on May 14, 1945. The Government appealed therefrom to this Court, which affirmed the judgment as to Lee Arenas on December 12, 1946. The Government sought a rehearing which was denied by this Court on January 14, 1947. It then sought certiorari which was denied by the Supreme Court on June 9, 1947. Appellees

filed their petition for fees on October 24, 1947, but final judgment for fees was delayed until April 5, 1951. The Government and Arenas again appealed, and this Court affirmed on March 16, 1953. Shortly thereafter, on appellees' application, the District Court entered an order for sale of a sufficient amount of the Arenas lands to satisfy the judgment for fees. Arenas then requested appellees to permit him to sell at private sale enough of his lands to satisfy the judgment, and the Government approved such request. Eight different requests for postponements of judicial sales were made by Arenas and granted by appellees after appellees were entitled to such sale. The Government approved the delays and joined in the several stipulations that the proceeds of private sales be paid into the registery of the Court and that the lien of the judgment be transferred to such proceeds. Thus Arenas obtained delays aggregating about 18 months after the right to a judicial sale had accrued. It was not until August 23, 1954, that appellees received any payment whatever on their fees and expenses in the Lee Arenas case, without interest on the judgment awarded them on April 5, 1951. In other words, appellees rendered legal services to Lee Arenas over a period of more than fourteen years before they received one cent of compensation therefor. And, appellees received no part of their attorneys fees, awarded on April 5, 1951, for a period of more than three years thereafter, and then without interest.

The foregoing facts show the inequitable conduct of the Government, and likewise the inequity that would result from failure to allow interest on the judgment for more than three years before any payment was made thereon. Under such circumstances appellees are entitled

to interest on said judgment as a matter of equity, and the allowance and payment of interest on the judgment under such circumstances is incidental to the exercise of the general equitable jurisdiction of the District Court. Appellees respectfully insist that this Court, by its decision, has curtailed the equitable jurisdiction of the District Court, contrary to the law of this case established by the former decision of this Court.

III.

The Judgment for Interest Is Not a Judgment Against the United States and Is Not a Charge Against or Payable Out of Any Funds or Property of the United States, but Is Against Lee Arenas and Is Payable Solely Out of the Proceeds of the Sales of His Allotted Lands Now in the Registry of the District Court. Hence, the Rule of Sovereign Immunity Invoked by the Appellants Does Not Apply.

In so far as the proceeding for allowance of attorneys fees is concerned, the United States is a necessary nominal, but non-liable, party thereto. Because of the restricted nature of the lands of Arenas, the law required that the United States be made a party to any proceeding affecting said lands. But the judgment for fees was solely against Arenas, and it provided in this connection:

> "FIRST: That the petitioners John W. Preston, Oliver O. Clark, and David D. Sallee have and recover from the plaintiff, Lee Arenas, as reasonable compensation for the services rendered by said petitioners for and on behalf of said plaintiff, in the above-entitled action the sum of Ninety Thousand Dollars ($90,000.00)." [R. 4.]

Other provisions of said judgment show that the judgment is a lien upon and shall be satisfied solely out of the "lands allotted to said plaintiff (Lee Arenas) by said allotment proceedings and * * * the entire interest, if any, in said lands in the hands of the United States of America." [R. 5.]

It is well settled by federal decisions that when a suit is against the United States, but no claim or debt is asserted against it but is asserted against other parties to the suit, the rule of sovereign immunity from liability for interest does not apply.

Miller v. Robertson, 266 U. S. 243, 257;

United States v. Creek Nation, 295 U. S. 103, 113;

Standard Oil Co. v. United States, 267 U. S. 76, 79;

Brownell v. Bank of America, 214 F. 2d 855, 856-857.

Cf.

St. Paul etc. Co. v. United States, 201 F. 2d 57;

Southern Printing Co. v. United States, 222 F. 2d 431;

DuPont v. Lyles & Long Const. Co., 219 F. 2d 328, 341, and cases cited.

In *Miller v. Robertson,* 266 U. S. 243, *supra,* the plaintiff Robertson sued Miller as Alien Property Custodian, White as Treasurer of the United States, and others, to establish a debt against funds in the possession of said officers of the United States, and the District Court gave judgment for plaintiff in the amount of $259,597.21 with costs. The District Court allowed interest from July 3, 1919, but the Circuit Court of Appeals allowed interest

from June 29, 1916. "Appellants object on the ground that this is a suit against the United States, and interest is not allowable against it * * *." (*Id.*, pp. 256-257.) But the Supreme Court rejected this contention, saying, at page 257:

> "While the suit, as held in Banco Mexicano v. Deutsche Bank, 263 U. S. 591, 603 * * * is one against the United States, the claim was not against it. No debt was alleged to be owing from it to the plaintiff. The rule of sovereign immunity from liability for interest (citing code provisions and other authorities) does not apply."

It is also significant that the Court, in this connection, pointed out the true basis of the rule under which interest may be allowed, even though the United States is a party to the suit, but no relief is sought against it. The Court said, at pages 257-258:

> "One who has had the use of money owing to another justly may be required to pay interest from the time payment should have been made. Both in law and in equity, interest is allowed on money due. (Citing case.) Generally, interest is not allowed upon unliquidated damages. (Citing case.) But when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages. (Citing many federal cases.)"

In *United States v. Creek Nation,* 295 U. S. 103, *supra,* the Creek Nation sued the United States to recover the value of tribal lands wrongfully taken by the United States and by it sold to others. The Court said, in respect to the liability of the United States to make compensation

to the Creek Nation for said lands, and to pay interest on the amount due, at page 111:

> "We conclude that the lands were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe * * * [p. 111].
>
> "But the just compensation to be awarded now should not be confined to the value of the lands at the time of the taking but should include such addition thereto as may be required to produce the present equivalent of that value paid contemporaneously with the taking. Interest at a reasonable rate is a suitable measure by which to ascertain the amount to be added."

The Court allowed 5% interest from the date of taking.

The decision in the *Creek Nation* case shows: (1) That the fact that the United States is a party to a suit does not mean that it may assert its sovereign immunity from liability for payment of interest for the benefit of a party not entitled thereto; and (2) that even the United States cannot assert its sovereign immunity in its own behalf if to do so would mean avoiding payment of just compensation to one equitably entitled thereto.

In *Standard Oil Co. v. United States,* 267 U. S. 76, *supra,* the Oil Company libeled the United States to recover on insurance policies issued by the United States insuring the Company's ship LLAMA and her freight and advances against war risks. The trial court gave judgment for libelant, the Circuit Court of Appeals reversed, the Supreme Court granted certiorari and reversed the

Court of Appeals. In respect to interest the Supreme Court said, at page 79:

> "Some question was made as to the allowance of interest. When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business. The policies promised that claims would be paid within 30 days after complete proofs of interest and loss had been filed with the Bureau of War Risk Insurance. The proofs seem to have been filed on January 11, 1917. The decree of the District Court will be corrected so as to allow for the total loss of the LLAMA, $115,000, with interest at 6 per cent from February 11, 1917; total loss of the freight etc., $44,686.82, with interest at 6 per cent from February 11, 1917; expenses incurred under sue and labor clauses, $2,270.34, with interest at 6 per cent from February 11, 1917."

The Supreme Court held the United States liable for interest in the absence of any statutory or contractual liability therefor, thus showing the rule of sovereign immunity will not be applied where it would be inequitable to do so.

In *Brownell, Atty. Gen. v. Bank of America,* 214 F. 2d 855, *supra,* the Bank asserted a debt claim against an enemy national's assets, and the Director of the Office of Alien Property allowed the principal, with interest. The District Court entered an order allowing post-vesting interest, and the Government appealed. The Court of Appeals affirmed the allowance of interest notwithstand-

ing the fact that neither the original World War I Act nor the amendment thereto provided for interest. Thus, again, the rule of sovereign immunity was held not to apply.

In *Seaboard Air Line Ry. Co. v. United States,* 261 U. S. 299, *supra,* the United States requisitioned land for war purposes. The Lever Act authorized such taking, but contained no provision for interest. The Court said:

> "Section 10 of the Lever Act authorizes the taking of property for public use on payment of just compensation. There is no provision for interest * * *.
>
> "The compensation to which the owner is entitled is the full and perfect equivalent of the property taken."

The Court allowed interest from date of taking.

It is true, of course, that the case last cited involved the taking of property for public use, and to that extent it differs from the instant case. But the cited case illustrates the point that when equity requires it, the courts will not apply the rule of sovereign immunity even when the United States is liable as a party. Obviously, there is no reason to apply the rule when the United States is only a necessary nominal party without liability to pay any part of the judgment rendered, including interest. Many other cases hold the United States liable for interest for the taking of property in the absence of statutory authorization.

In *Board of Commissioners v. United States,* 308 U. S. 343, the Supreme Court had this to say about the judicial rule regarding interest as an incident to the main relief sought (*Id.,* p. 250):

> "In ordinary suits where the Government seeks, as between itself and a private litigant, to enforce a money claim * * * this Court has chosen that rule as to interest which comports best with general notions of equity. (Citing U. S. cases.) Instead of choosing a rigid rule, the Court has drawn upon those flexible considerations of equity which are established sources for judicial law-making."

And the Court continued, at page 352:

> "The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable. (Citing cases.)"

These statements of the Supreme Court fully sustain the argument made herein (1) that where failure to allow interest would be inequitable, it should be allowed, and (2) that the rule applies to the United States. The cases cited, *supra,* also fully sustain the argument.

Under the facts of this litigation, as briefly stated herein and as shown by the former decisions of this Court in this case, there can be no doubt that appellees should be allowed interest, as a matter of right and of equity.

See, also,

DuPont v. Lyles & Long Const. Co., 219 F. 2d 328, 341-342;

Southern Printing Co. v. United States, 222 F. 2d 431, 435;

Royal Ind. Co. v. United States, 313 U. S. 289, 296.

In the *Royal Indemnity* case, *supra,* the Court said (313 U. S. 289, 296):

> "But the rule governing the interest to be recovered as damages for delayed payment of a contractual obligation to the United States is not controlled by state statute or local common law. In the absence of an applicable federal statute it is for the federal courts to determine, according to their own criteria, the appropriate measure of damages, expressed in terms of interest, for nonpayment of the amount found to be due. (Citing cases.) * * *
>
> "* * * even in a case of unliquidated damages 'when necessary to arrive at fair compensation, the court in the exercise of a sound discretion may include interest as an element of damages.' "

The rule thus announced has equal application where the positions of the parties are reversed. The United States cannot logically and fairly invoke the equitable judicial rule and practice in favor of itself alone, but must follow it when the positions of the parties are reversed. In homely English "what is sauce for the goose is sauce for the gander."

IV.

The District Court Had and Exercised Its Equitable Jurisdiction and Discretion in Allowing Interest on the Judgment for Attorneys Fees and Expenses, Hence the Decision in Anglin & Stevenson v. United States, 160 F. 2d 670, Is Not Applicable Under the Facts of This Case.

In *Anglin & Stevenson v. United States,* 160 F. 2d 670, the District Court clearly indicated that if "it had known that interest would be claimed, he would have 'probably lessened the amount' of the original judgment." (160 F. 2d at p. 672.) In other words, in such case the District Court would have exercised its discretion to allow a smaller fee and add interest thereon. Therefore, as the fee was ample without interest the District Court exercised its discretion to disallow interest. In the case at bar, however, the District Court exercised its discretion and its equitable power to and did allow interest.

Moreover, the two cases are different in other essential respects, which will now be set out. In the *Anglin & Stevenson* case the attorneys were promptly paid the full amount of the judgment awarded for fees as soon as said judgment was affirmed; but in the case at bar the principal amount of the judgment was not paid until about one and one-half years after affirmance of the judgment, and about three years after said judgment was rendered by the District Court. In the *Anglin & Stevenson* case no claim for interest was made until after the judgment was fully paid; but in the case at bar the claim for interest was made and allowed long before any of the Arenas property was sold, and also before any payment was made on the judgment. At the time interest was claimed and allowed in the *Arenas* case the equitable jurisdiction

and processes of the District Court had continued by reservation of jurisdiction in the decree and the award of interest was therefore a part of "one continuous litigatory process." (160 F. 2d at p. 673.) In the *Anglin & Stevenson* case the court held that "When the judgment was entered and became final (by payment, we suppose), the equitable jurisdiction of the court was exhausted." (*Id.*)

Another difference in the two cases is this: In the *Anglin & Stevenson* case the funds were not recovered, in any sense, by the attorneys for the heirs, but at all times had been and were in the custody of the United States in its sovereign capacity and, as the court said, "they thus became clothed with immunity from the exaction of interest." In the case at bar, the allotments of lands of the Arenases were actually recovered for them by their attorneys, and the proceeds of sales thereof, made by the Arenases by consent of the Government to satisfy appellees' judgment, were in the registry of the District Court and subject to the orders of that court.

Another distinction is pointed out by the Court of Appeals in the *Anglin & Stevenson* case in the following language (160 F. 2d 673):

> "The rule of sovereign immunity from interest has been held inapplicable in a suit against the alien property custodian under the Trading with the Enemy Act, 50 U. S. C. A. Appendix, sec. 1 *et seq.*, Miller v. Robertson, 266 U. S. 243, 45 S. Ct. 73, 69 L. Ed. 265. In that case, interest was awarded for breach of contract. The court held that although the suit was against the Government, the claim was not against it, and the sovereign immunity from interest did not therefore apply. But, unlike our situation, the interest was allowed as a part of the adjudicatory

process. It was not allowed or claimed on the judgment as we are asked to do here." (*i. e.,* on a judgment already paid).

In the *Miller v. Robertson* case, 266 U. S. 243, referred to in the last above-quoted language, the United States held in its custody the property or funds of an alien enemy. The suit was brought and judgment was given for breach of contract by the alien enemy. In our case the claim for fees is based upon *quantum meruit* which, in turn, rests upon the written contract of employment. No distinction can properly be made between the contract referred to in the *Miller v. Robertson* case and the contract between Arenas and his attorneys. Liability under assumpsit is not less than when fixed by specific provisisions of a written contract.

The United States, as a stakeholder, possessed the funds of an enemy alien in *Miller v. Robertson, supra.* The United States, as trustee, held the real property of Arenas in the case at bar, but the funds of Arenas which were obtained from the sales of his lands were held, at all times, in the registry of the District Court. Only by implication may it be said that such funds were in the custody of the United States. Moreover, at all times after the original judgment for fees was rendered, the appellees had an equitable lien on the lands and funds of Arenas, and that lien could be discharged only by payment of the judgment for fees, with interest.

In view of the foregoing facts and distinctions we submit that the *Anglin & Stevenson* case is not in point, nor is it in any sense controlling in the case at bar. It may be observed that, if the *Anglin & Stevenson* case is invoked and applied as *stare decisis* under the facts of this case, it is in conflict with every concept and applica-

tion of equitable principles and procedures referred to in the many cases cited under Points I, II and III of this petition. Certainly, the United States is not entitled to invoke the rule of sovereign immunity from interest in this case, because the judgment imposes no liability against it. It has no property interest in the funds of Arenas, and it can suffer no diminution of funds held by it as sovereign by the payment of interest from the funds of Arenas.

V.

The Equitable Lien Impressed Upon the Allotted Lands of Arenas by and as Part of the Judgment for Fees Cannot Be Discharged Except Upon Payment of the Judgment, Together With Damages for Delay in Paying the Judgment.

The opinion does not make any mention of the above stated point, which was presented to the Court in slightly different form and language at pages 19-21 of appellees' brief. There can be no full redemption of the Arenas lands or funds derived from the sales thereof, the proceeds of which are on deposit in the registry of the District Court, until the full amount of the judgment, with damages for delay, is paid.

California Civil Code, Secs. 2905, 2912;
16 *Cal. Jur.* 324, 347;
San Pedro Lbr. Co. v. Reynolds, 121 Cal. 74;
Loughborough v. McNevin, 74 Cal. 250.

> "Redemption from a lien is made by performing, or offering to perform, the act for the performance of which it is security, and paying, or offering to pay, the damages, if any, to which the holder of the lien is entitled for delay." (*Civ Code,* Sec. 2905.)

The sum of $122,114.00 net realized from the sales of the Arenas property at private sale, was, by agreement of the parties, including the United States, paid into the registry of the District Court and the lien of the judgment was transferred to and impressed upon said funds. Under the California statutes, relating to the extinguishment of liens, the property thus subject to appellees' equitable lien can be redeemed only by payment of the judgment and damages for delay. (*Civ. Code,* Secs. 2905, 2912.)

There can be no doubt that appellees have been damaged by the delay of appellant Arenas in paying the judgment. The measure of such damages "is deemed to be the amount due by the terms of the obligation, *with interest thereon.*" (Cal. Civ. Code, Sec. 3302. Emphasis added.) The California statutory rule accords with the rule in equity set forth, *ante,* hence is applicable.

While the Conformity Act is superseded by the Federal Rules of Civil Procedure, it is still true that in common law actions state law will be applied by the federal courts. It is also true that in suits in equity the federal courts will look to the laws of the state for ascertainment of substantive rights, and will enforce and protect rights given by a state statute which are properly the subject of an equity suit, and this is especially true when the state statute constitutes a rule of property.

35 C. J. S. 1236-1238, Sec. 166 of Federal Courts, and the many federal cases cited in notes 63-66.

Conclusion.

Wherefore, for the reasons stated, appellees respectfully urge the Court to grant their petition for a rehearing, and that upon further consideration the judgment of the District Court be affirmed in all respects.

Respectfully submitted,

JOHN W. PRESTON,
OLIVER O. CLARK,
DAVID D. SALLEE,
Appellees.

Certificate of Counsel.

I, John W. Preston, Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

JOHN W. PRESTON,
Petitioner.